United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 5, 1999

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Steelworkers (AK Steel Corp.)
Case 9-CB-10029

This Section 8(b)(3) case was submitted for advice on whether the Union unlawfully refused to supply copies of unpublished industry arbitration awards dealing with subcontracting under the parties' bargaining agreement.

The Union represents the Employer's production and maintenance employees; the parties' bargaining agreement expired in August 1993 but was extended. Over the past decades, the Union's pattern of bargaining produced essentially uniform terms and conditions of employment throughout the steel industry. By 1986, the Union's "Basic Steel Industry" agreement covered numerous bargaining units comprising over 100,000 employees. The Employer's bargaining agreement is similar to the basic industry agreement and contains an identical "contracting out" provision.

Under all industry contracts, permanent arbitrators and deputies have issued thousands of arbitral awards concerning the language of this "contracting out" provision. The Union published some 25 to 30 percent of these awards until 1993 when it ceased publishing any awards. Thereafter, the Union retained copies of awards forwarded to it by constituent locals, and used them to create a computer data base for its own use in arguing arbitrations.

The Employer and the Union have processed numerous "contracting out" grievances through arbitration. The industry has a permanent arbitrator, Joseph, who hears and decides all "contracting out" arbitrations in the industry. Many of these "contracting out" arbitrations, including those of the Employer, are processed under the "expedited" procedure of applicable agreements. These agreements, including the Employer's, provide that any "expedited decisions" shall not be relied upon for precedent. Notwithstanding this contractual language, however, it appears that both the Union and the industry employers routinely submit previous industry "expedited" decisions, as

well as regular arbitral awards, to arbitrators for "guidance."

The instant dispute arose over the parties' processing of Grievance 92-90, filed in August 1992, alleging that the Employer was using rental equipment to displace company equipment. The Union invoked arbitration in 1994 and a non-expedited arbitration hearing was held in June 1998. At the hearing, the Union argued that arbitrators have uniformly determined that maintenance work on leased equipment is "contracting out" within the prohibition of the bargaining agreement. In October 1998, arbitrator Joseph issued an initial decision concluding that the maintenance work in dispute did amount to "contracting out", but that the record was insufficient to determine whether such work was otherwise exempt from the contractual restriction under certain contractual language which described employer "existing rights." Joseph therefore remanded the case and directed the parties to "address the issue raised by the language of the Agreement and its interpretation by arbitrators in the steel industry(emphasis added)."

On October 14, 1998, the Employer asked the Union for copies of all arbitration decisions since January 1, 1990, relating directly or indirectly to the issue of "contracting out" by other employers in the industry. The Employer offered to pay for photocopying costs. On November 12, 1998, the Union denied the Employer's request stating that (1) many arbitral decisions had already been published through 1993; (2) decisions subsequent to that date are maintained in the Union's computer data base and thus need not be supplied as the "work product" of the Union; and (3) the Employer could obtain arbitral decisions from other employers in the industry. On October 23, prior to denying this information to the Employer, the Union sent arbitrator Joseph previous arbitral decisions interpreting the "contracting out" language in dispute.

On November 19, 1998, the Employer responded to the Union's refusal to supply the requested arbitral decisions by requesting all unpublished arbitral awards in the Union's possession dealing with the "existing rights" language in the basic steel agreement. The Union denied this second request for essentially the same reasons as it denied the first.

In mid-December, the parties conducted a supplemental hearing on Grievance 92-90. The Union presented several arbitration awards in support of its position. The Employer presented one arbitral award, which it asserts it had in its files by happenstance from a past arbitration.

On February 3, 1999, the Employer advised the Union that it was preparing for three upcoming arbitrations involving "contracting out" issues, and therefore was requesting copies of all unpublished arbitral decisions dealing with those issues. The Union replied that such awards were neither relevant nor necessary and the Union would not supply them. The Union specifically argued that most of these awards were processed under the "expedited" procedure and thus had no precedential value under the express terms of the parties' bargaining agreement. The Union noted that, during the processing of Grievance 92-90, the Employer had requested that arbitrator Joseph compel the Union to provide prior awards, and Joseph had denied that Employer request. Finally, the Union argued that its collection of arbitration awards into a computer searchable data base concerned "law" and not facts, and thus was not subject to discovery.

In April 1999, Joseph issued a supplemental decision in Grievance 92-90 finding that the Employer did have the "existing right" to contract out the work in dispute. In reaching his decision, Joseph reviewed and considered the various prior arbitration awards cited by the parties.

We conclude, in agreement with the Region, that the Union unlawfully failed to provide the requested information for the processing of Grievance 92-90.[1]

We conclude that the Employer has established the relevance of this requested information which is not presumptively relevant since it concerns matters outside the represented unit. In HERE Local 226 (Caesar's Palace), 281 NLRB 284 (1986), an employer association had negotiated separate bargaining agreements, one covering the downtown area and the other called the "strip agreement." In 1984, employers covered by the "strip agreement" withdrew from multiemployer bargaining and authorized the association to negotiated individual agreements. The result was eleven separate but virtually identical "strip agreements." Around this time, the association negotiated for the "downtown" employers separate agreements that were substantially identical to the "strip agreements." All these contracts contained a grievance-arbitration provision under which the parties in the vast majority of cases selected arbitrators

[1] In that regard, the mere fact that this particular arbitration over Grievance 92-90 has concluded does not "moot" this Section 8(b)(3) violation. See, e.g., Finn Industries, Inc., 314 NLRB 556, 557 at note 13 (1994); Wayne Memorial Hospital Association, 322 NLRB 100 (1996).

from their own panel. The majority of these arbitrations decisions were not published. However, the union routinely attached unreported prior awards to briefs submitted to arbitrators who relied upon such awards. One arbitrator advised the parties to become knowledgeable about prior awards because they should expect to be bound by them under the doctrine of stare decisis.

The association asked the union for copies of all arbitral awards in the geographical area covered by the union. The association pointed out that the decisions were relevant and necessary to interpret the parties' agreement; to deciding in the first instance whether to even take a grievance to arbitration; to assist in future negotiations; and give the parties a "feel" for a particular arbitrator. The union declined to supply the prior awards.

The ALJ, adopted by the Board, found a violation stating that "there can be no question of the relevancy of the material sought here, given the pattern of collective bargaining ... [the union's] conduct ... and the attitude of the arbitrators who regularly decide Las Vegas area arbitration cases." The ALJ pointed out that the hotel/casino agreements were virtually identical; that the union routinely attached prior arbitral decisions to its arbitral arguments; and that arbitrators considered these prior decisions.

We conclude that the arbitral decisions in the instant case were relevant to Grievance 92-90 and should be supplied essentially under the rationale of Caesar's Palace. We note that the prior awards in Caesar's Palace were considered relevant because they were considered stare decisis by arbitrators. In contrast here, the parties' bargaining agreement expressly states that, at least for "expedited" awards, they have no precedential value. Nevertheless, regarding Grievance 92-90, arbitrator Joseph expressly asked the parties to address the interpretation of the contract language in dispute "by arbitrators in the steel industry." Thus arbitrator Joseph here, like the arbitrators in Caesar's Palace, explicitly made the prior arbitrations relevant to that Grievance, notwithstanding the parties' contract language giving "expedited" awards no precedential value.[2]

The Union defends its refusal on three grounds, viz., that the Employer could obtain copies of arbitral awards

[2] In this regard there is no evidence that the Union ever asked the arbitrator to limit his request to non-expedited awards.

from other industry employers; that arbitral awards in a computer searchable data base concern "law" and not discoverable facts, and that the arbitration awards are attorney work product, like witness statements. These defenses were rejected in Caesar's Palace.[3]

The charge also alleges that the Union failed to give the Employer arbitration awards for other arbitration hearing. Thus, on February 3, 1999, the Employer advised the Union that it was preparing for three upcoming arbitrations involving "contracting out" issues, and requested copies of all unpublished arbitral decisions dealing with those issues. The Union refused to turn over the arbitration awards. As was the case with the first request, it is broad enough to include both expedited and non-expedited awards. Thus, to the extent the Union failed to turn over non-expedited awards, it they violated the Act under the rationale of Caesar's Palace. As to expedited awards, it is unclear to what extent the Union itself had attempted to use prior expedited arbitration awards in its data base as support for its position in these three pending arbitrations.[4] To the extent that the Union had attempted to rely upon prior arbitral awards in pressing these three pending grievances, the Union itself made prior expedited arbitral awards relevant and suppliable, upon request.[5] On

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[3] Regarding the available from other employers defense: "the fact that the employer may have been able to obtain the information elsewhere does not, absent special circumstances, diminish the obligation to furnish . . ." Id. at 289. Regarding the "law" and not "facts" defense, the ALJ found the prior arbitral awards relevant specifically because they were legal precedent: "[W]e are not concerned with evidence . . . Arbitration decisions in the Las Vegas area become, in effect, the 'law of the shop', governing at all Respondent-represented facilities." Id., at 290.

[4] At the 1998 initial arbitral hearing of Grievance 92-90, the Union argued that prior arbitrators uniformly had determined that maintenance work on leased equipment is "contracting out" within the prohibition of applicable bargaining agreements. Thus, the Union itself had made all prior arbitral awards germane to that dispute.

[5] The Board has held that, if one party formulates a bargaining or grievance position based on nonunit data, it must disclose that data, on request, so that the other party will have "an opportunity to fairly understand the merits of [that] position." General Electric Co. v. NLRB, 466 F.2d

the other hand, to the extent that the Union had not relied upon prior expedited arbitral awards, we would not find them relevant. In that regard, the parties' bargaining agreement language, placing no precedential value upon "expedited" awards, distinguishes the instant case from the circumstances in Caesar's Palace.

Finally, the Union has asserted that provision of this information would cause its constituent Locals to refuse to forward arbitral awards in the future and would thus destroy the Union's data base. In our view, this raises a mere pragmatic defense rather than a defense under Detroit Edison,[6] because the latter requires that prior assurances of confidentiality have been given. There is no evidence of any such prior assurance of confidentiality and, in any event, these arbitration awards are useless if kept confidential. However, to the extent that this argument does raise "confidentiality" defenses under Detroit Edison, the ALJD adopted by the Board in Caesar's Palace already found that defense unavailing.[7]

B.J.K.

1177, 1184 (6th Cir. 1972), enfd. 192 NLRB 68 (1971). See also Lamar Outdoor Advertising, 257 NLRB 90, 93-94 (1981).

[6] Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)

[7] Respondent in Caesar's Palace argued "confidentiality" based upon "the privacy interests of the grievants involved." The ALJ rejected that defense noting "not only is there no evidence that such commitments were ever made to grievants but also there is no evidence that confidentiality was ever a concern." Id. at 290.